ABDUL KAREEM v. REG.

[A. Cr. J. (Shepherd J.) July 31, 1957]

[Penang — Criminal Appeal No. 19 of 1957]

Betting — Betting Ordinance, 1953 — "Common betting house" — "Place" — "Access" — Betting by telephone — "Habitual" — Presumption under s. 9 — Warrant — Written information on oath.

The accused occupied a small room in the front portion of No. 216A Macalister Road, Penang, where he carried on his business activities. The rest of the premises — No. 216A Macalister Road — which was a large building, were devoted to the ordinary purposes of domestic residence or a series of domestic residences. On May 19, 1956 the police raided accused's room on the authority of a search warrant issued under section 12(1) of the Betting Ordinance, 1953. The accused was arrested as he attempted to leave his room. In his hand was found a book which contained betting accounts and betting slips. Various documents and slips of paper were found in accused's room which were later shown in evidence to be documents falling within the provisions of section 9 of the Ordinance. The accused was charged with assisting in the management of a common betting house, an offence under section 4(1)(c) of the Betting Ordinance, 1953 and punishable under section 4 of the said Ordinance. The accused's defence was that he knew nothing about the aforesaid documents and slips of paper; that he occupied the room in question simply as business premises; that the rest of the premises were occupied by other persons, principally Chinese, who had nothing to do with him. Accused was convicted. On appeal, —

Held: (1) the presumptions under section 9 of the Ordinance did not arise as the premises were "not entered under the Ordinance." The Senior Police Officer who issued the warrant had stated: "On 7.5.56 I took a sworn information from an informer, that betting was being carried on in 216A Macalister Road, Penang." What the section requires is not that notes should be taken of the information given on oath but that it should be "a written information on oath" which means an information in a written form sworn to by the deponent, the most convenient form of which would be a statutory declaration. There was no evidence in this case that the warrant was issued on "a written information on oath" and any presumption under section 114(e) of the Evidence Ordinance which may be invoked on the authority of **Re Lim Kwang Teik & Ors.**(1) was negatived in this case by the evidence of the Officer who issued the warrant. Secondly section 12(1) of the Betting Ordinance authorises a search warrant to be issued if the person therein authorised is satisfied "that there is good reason to believe that any place is kept or used as a common betting house." The warrant in this case was a stencilled form which recited "whereas I am satisfied upon written information on oath and after such further enquiry as I have thought to be necessary that there is good reason to believe that 216A Macalister Road, Penang is kept or used as a betting house, this is to authorise you, etc. . . . ." Thus the warrant itself was not in order, since there can be no authority to issue a warrant where a suspicion only attaches to a betting house. **Lee Chin Seng v. Public Prosecutor**(2) followed;

(2) although there was evidence that bets were laid by telephone this did not amount to access within the meaning of the definition, and as there was no other evidence that the public had access to the accused's room, it was not a common betting house within the first limb of the definition of a common betting house;

(3) although there was evidence of habitual betting in the ordinary sense of the word, i.e., oft-repeated laying of bets by the same parties or by some of them, there was no evidence that accused's room was used for habitual betting in the limited sense namely that it was primarily used for betting. **R. v. Li Kim Poat & Anor.**(3) followed;

(4) on the authority of **R. v. Li Kim Poat & Anor.**(3) accused's room was not a "place" within the meaning of the Ordinance as construed by the Court of Appeal since the rest of the premises were devoted to the ordinary purposes of domestic residence. For the same reason accused's desk and telephone thereon was not a place within the meaning of the section as his room was largely devoted to his business activities;

(5) there are two distinct types of common betting houses under the Ordinance — the first being the "open type" where the public have access and the second being the "closed type" where the public has no access but where habitual betting is carried on. The prosecution did not make it clear to which type they referred to in the charge and this omission may well have prejudiced the defence. The prosecution failed to carry out its duty which was to indicate clearly in the charge the offence or offences which the accused was alleged to have committed. If the prosecution had any doubts they could have laid charges in the alternative under both portions of the definition as was done in **Li Kim Poat's case**;

(6) the conviction must be quashed and the fine, if paid, should be refunded.

Cases referred to :—

(1) *Re Lim Kwang Teik & Ors.* (1954) M.L.J. 159.

(2) *Lee Ching Seng v. Public Prosecutor* (1954) M.L.J. 181.

(3) *R. v. Li Kim Poat & Anor.* (1933) M.L.J. 164.

MAGISTRATE'S CRIMINAL APPEAL.

Lim Cheng Poh for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Shepherd J. : — This is an appeal by one Abdul Kareem s/o Kappal Lubbai Maniam against a conviction entered by the Magistrate sitting at George Town on the 29th January, 1957, whereby the appellant was found guilty upon the following charge :—

"You are charged that you on or about the 19th May, 1956, at 216A, Macalister Road, Penang, did assist in the management of a common betting house and you have thereby committed an offence under section 4(1)(c) of the Betting Ordinance, No. 47 of 1953 and punishable under section 4 of the said Ordinance."

It will be noted that the charge states: "at 216A, Macalister Road, Penang"; it does not allege which portion of these premises was used as a common betting-house. I shall refer to this matter again.

I will not go into the evidence at length; suffice it to say that on the 19th May, 1956 a raid was conducted upon the above premises and the accused arrested therein as he was attempting to leave a particular room in the front portion of these premises. In that room various documents and slips of paper were found which were later shown in evidence to be documents falling within the provisions of section 9 of the Ordinance. A book — in fact an exercise book, of which translations were made so far as certain entries therein were

concerned — was proved in evidence (see Ex. P4A and B). In fact it was found in the appellant's possession and such book and slips of paper were stated by an expert witness to be articles used as a subject or means of betting within the meaning of the section.

The defence of the accused was that he knew nothing about the aforesaid documents and slips of paper; that he occupied the room in question simply as business premises; that he was interested in horse-racing but at no time accepted any bets; that the rest of the premises referred to in the charge were occupied by other persons, principally Chinese, who had nothing to do with him.

The first question to which I shall address my mind is as to whether this Ordinance should be strictly construed in favour of the appellant, if such a construction be necessary. Mr. Lim Cheng Poh, who ably put the case for the appellant, referred to *Roland Braddell's* "Common Gaming Houses", 2nd edition, and drew my attention to the "Summary of Rules of Construction" referred to at page 5 thereof. The Summary reads as follows :—

"From these cases the following conclusions will be drawn:—

(i) The Ordinance is of a highly penal character and interferes with the liberty of the subject.

(ii) It must therefore be construed strictly.

(iii) No case must be held to fall within its provisions that does not fall within the reasonable meaning of its terms, even though it may fall within the mischief intended to be prevented.

(iv) In construing the Ordinance, Courts ought to be guided very much by the decisions upon it.

(v) When there is any ambiguity or obscurity in any of the provisions of the Ordinance, Courts should give the benefit of the doubt in favour of the subject."

I intend to apply these Rules as I consider they are well founded. As the learned author observes :—

"Gaming, by playing at cards, dice or any other games, when practised without fraud and as a recreation, is not an offence at Common Law. So too, all wagers not against the principles of morality, public decency, or sound policy were held good at Common Law. Lastly, lotteries at common law are perfectly legal. Therefore gaming, betting and lotteries are not *mala per se*. These facts are important to be borne in mind for as the Common Gaming Houses Ordinance is the one which causes things, legal in themselves, to be illegal, it is necessary to see that the Ordinance is kept well within its four walls and not extended under any mistaken idea that the mischiefs against which it is aimed are such as are repugnant generally to the law and not specially to this particular law."

These remarks were applied to the Common Gaming Houses Ordinance but might be applied with equal relevance to the Betting Ordinance. Having reached this conclusion it is only necessary to observe that whilst the Ordinance must be strictly construed in favour of private persons that does not mean that especially strict or hypocritical standards should be applied to any evidence which is led in support of an offence under the Ordinance. For example, I see no reason why the presumption referred to in Illustration (e) of section 114 of the Evidence Ordinance should not be applied in proper cases where the due performance of any official act is called in question, as laid down by Spenser Wilkinson J. in *Re Lim Kwang Teik & Ors.*[1] The relevance of this remark will become clear later. My attention, however, was drawn by learned Counsel for the appellant to the case of *Lee Ching Seng v. Public Prosecutor*[2], which is authority for the proposition that unless there was written information given on oath or that entry and search was effected as a result of a search warrant issued as provided by section 18(1) of the Ordinance or that, in default of such warrant, the other appropriate circumstances apply, the presumption under section 9 cannot arise. I consider that whilst some evidence must be given of compliance with the section nevertheless, that having been done, the presumption referred to in the judgment or Spenser Wilkinson J. may be applied; the evidence, for example, might simply be that a warrant was issued following the receipt and consideration of information as required by the section.

I will now consider the provisions of the Ordinance.

As the learned author of "Common Gaming Houses", 2nd edition indicated it is necessary to consider the mischief which the Ordinance set out to cure, and in this connection the long title is relevant — "An Ordinance to suppress betting-houses and betting in public places". A reference to the long title is, however, only necessary if it is not possible to give a clear interpretation unaided to the provisions of any particular section of the Ordinance. In my view for what it is worth the material provisions of this Ordinance are sufficiently clear without having reference to this title and the reasons for this will be clear upon a study of the dissenting judgment of Whitley J. in *Rex v. Li Kim Poat & Anor.*[3] (164 at page 169) commencing with the words :—

"It was urged that the Court may look to the long title of the Ordinance in order to arrive at a conclusion as to its scope and intention and that as the long title states that the object is to suppress Betting-houses and Betting in public places the word "place" in the Ordinance can only refer to public places. With respect, however, this seems to me to be too narrow a reading. The object is to suppress betting in public places and *also* in Common Betting-houses and by the definition in section 2 it is clear that a common betting-house may be either 'a place to which the public have access' i.e. 'a public place' or 'a place to which the public have not access' which is 'a private place' and would include a club. I can see nothing in the long title which would prevent the application of the Ordinance to the facts established in the present case."

"Common betting house" is defined in section 2 of the Ordinance as follows :—

" 'Common betting-house' means any place, to which the public or any class of the public has, or may have, access, kept or used for betting or wagering on any event or contingency of or relating to any horse race or other race, fight, game, sport, lottery or exercise, and any place, whether the public or any class of the public has, or may have, access thereto or not, kept or used for habitual betting or wagering on any such event or contingency as aforesaid;"

There are clearly two portions to this definition, either of which may be applied to the facts of any particular case. The word "place" and the word "access" occur in both parts and the word "habitual" occurs in the second part only; and a proper understanding of the meaning of these words is essential. A consideration of the authorities, including the authority just quoted, leads me to suppose a "place" within the meaning of the section may include a small room in a house. In the case in question it was held by a majority that "the Members' Enclosure of the Singapore Turf Club is not a place nor a common betting-house within the meaning of Ordinance No. 133 (Betting)", the charges were "first, of using a place in front of the totalisator in the Members' Enclosure of the Singapore Turf Club as a common betting house; and secondly, of using the place in front of the totalisator in the Members' Enclosure at the Singapore Turf Club as a common betting house which place was habitually used for betting". In the present case the charge only refers to the house which was raided but not to a particular place, namely the small room in the front, which the learned Deputy subsequently agreed was the place referred to in the charge. In this respect the form of the charge is at fault and, as will subsequently appear, the result is in any event fatal from the point of view of the prosecution.

The word "access" is variously defined in the *Oxford Dictionary* (The New English Dictionary), but the meaning clearly to be assigned to the word is as follows :—

" 'Access' — the action of coming towards, coming, approach, advance. Contrasted with 'recess' ".

It was urged upon me by learned Counsel for the appellant that the only relevant evidence of the prosecution was that bets were laid by telephone, and that this did not amount to access within the meaning of the definition. With this I am entirely in agreement; the context of the section and, indeed, the tenor of the Ordinance itself leads me to suppose that the laying of bets by telephone was not the mischief which the Ordinance set out to cure *per se;* different remarks might apply, however, if a place were shown to be used for habitual betting in the modified sense in which the term was used in *Li Kim Poat's case*[3]. It will be observed from the remarks which follow that whilst I am satisfied that habitual betting in the ordinary sense was being carried on somewhere within the premises alleged, that is to say, within the room in question, it was not being carried on at No. 216A, Macalister Road regarding the place as a whole, and it was not in any event habitual betting within the limited construction placed upon the term by the Court of Appeal. I am driven to this conclusion, with regret. I consider I am bound by the majority decision in the case I have quoted, though I will be perfectly frank in admitting, with respect, that I prefer the minority view, namely, the view of Whitley, J. But I will refer in more detail to this matter shortly.

So far as "access" is concerned, the physical or bodily access was not shown to have existed and only the ability to communicate by means of telephone or presumably post was established in this case. That access in the defined sense was not obtainable was clear, if for no other reason, from the fact that the Police had to break down a side door in order to get in : the front door was closed.

As to the meaning of the word "habitual", this can only mean in the context the oft-repeated laying of bets by the same parties or by some of them. As indicated above I consider that this aspect of the case was established by the prosecution evidence, but not in the limited sense adopted by the Court of Appeal.

Having considered the meaning of these three words, I now revert to the definition of "common betting-house". As indicated there are two alternative interpretations of the term, the one requiring access and the other not; but the second-named requiring proof, as I have indicated of habitual betting.

A great deal of argument was heard on the question whether or not the presumption contained in section 9 of the Ordinance could be held to apply to the facts of this case. I have concluded that, in fact, the presumption could not be held to apply; but that despite this fact there was evidence of habitual betting though not sufficient to bring the place within the definition of common betting-house, in view of the limited definition to which I have referred. In view of what I have said it is perhaps desirable to consider the provisions of section 9 in the light of the circumstances of the present case. Certain important points of principle arise.

The section reads as follows :—

"9. If any books, documents, telegrams, writings, circulars, cards or other articles used as a subject or means of betting or wagering, or in connection therewith, are found in any place entered under this Ordinance, or upon any person found therein, or if persons are seen or heard to escape therefrom on the approach or entry of a Magistrate or Justice of the Peace or Senior Police Officer or if a police officer or any person having authority under this Ordinance to enter or go to such place is unlawfully prevented from or obstructed or delayed in entering or approaching the same or any part thereof, it shall be presumed, until the contrary is proved, that the place is a common betting-house, and that the same is so kept or used by the occupier thereof and any person upon whom any such articles are found shall be presumed until the contrary is proved to have been assisting in the management of such betting-house."

I have indicated that books, documents, etc. sufficient to fulfil the requirements of the section were found; but Mr. Lim Cheng Poh most ably urged upon me that the section could not be applied, since the place in question had not been "entered under this Ordinance". To effect entry under the Ordinance it is necessary to follow a certain procedure. Section 12 sets out that procedure, and it was urged by Mr. Lim Cheng Poh that the necessary "written information upon oath" had not been obtained by the Senior Police Officer before he issued the warrant; or at least that it had not been proved that such information had been obtained. The presumption referred to in the above-mentioned judgment of Spenser Wilkinson J may, indeed, be applied, but upon the facts of the present case as established by the evidence I have extreme doubt whether such presumption is not displaced by the evidence of the prosecution itself. The warrant (which, by the way, is a stencilled form) begins with a recital :—

"Whereas I am satisfied upon written information on oath and after such further enquiry as I have thought to be necessary that there is good reason to believe that 216A, Macalister Road, Penang is kept or used as a Betting-house, this is to authorise you etc. . . . . ."

Quite incidentally the section (section 12(1)) authorises a search warrant to be issued if the person therein authorised is satisfied "that there is good reason to believe that any place is kept or used as a common betting-house"; thus the warrant itself is not in order, since there can be no authority to issue a warrant where a suspicion only attaches to a betting-house (i.e. presumably a private betting-house) as distinct from a common betting-house, which must clearly have the "public" attributes referred to in the definition in section 2. I will not go so far as to say, however, that the entry was unlawful; the material point is to decide whether the entry was made within the provisions of this section. Although the recital to the warrant indicates that the original information was obtained as required by the section I am by no means satisfied that that was so. This is, as I have indicated, a stereo-typed form not prepared for the particular occasion; and in addition the evidence of Mr. Edward Hyden Harries, the Senior Police Officer issuing the warrant is in the following terms :—

"On 7.5.56 I took a sworn information from an informer, that betting was being carried on in 216A Macalister Road, Penang."

It was urged upon me that to take information implied committing it to writing. That may be so; but what the section requires is not that notes should be taken of the information given on oath, which is the common place way of recording evidence in Court, but that it should be "a written information on oath". This can only mean in my view an information in a written form sworn to by the deponent, the most convenient form of which would be a statutory declaration.

In spite of the presumption referred to above I am not satisfied that such information was obtained upon the evidence before me and thus I hold that entry was not made in accordance with section 9 and thus the presumption contained in that section were not available to the prosecution. It follows, therefore, that I ought to be satisfied that the prosecution has proved *aliunde* the necessary ingredients of the charge.

At the end of the prosecution case there was a great body of evidence tending to show that the small room in the front of these premises was used as a common betting-house within the provisions of the second part of the definition to which I have referred above. No fewer than 8 witnesses gave evidence of the raid (I was at a loss to understand why the time of the Court was taken up by repetitive evidence of this relatively unimportant event) when the accused was seen to try to leave the room in which he was working in a great hurry. Indeed, he was seen to collide with a screen; he was physically apprehended as he was rushing into the hall in the centre of the building and he made a subsequent attempt, which was unsuccessful, to escape. All this was, indeed, evidence indicating some form of guilty knowledge or intent and, in fact, had the presumptions contained in section 9 been applicable this evidence alone would have given rise to the presumption that the place from which he was escaping was a common betting-house. In his hand, when arrested, was a pink exercise book containing entries in Tamil which, when translated, indicated among other things the state of the account of a person named Shariff on the 14th May — five days before the raid. In the exercise book were slips of paper covered

with figures and hieroglyphics which an expert witness P.W.9, A.S.P. Tan Chin Teik, a person obviously familiar with all the intricacies of the system of book-making on races, stated to be in his opinion documents relating to bets previous to the 19th May. Other similar documents were found in a drawer and in an almeirah, of which the accused had the keys; there were race cards and newspapers littered about the room and the Rediffusion was at the time broadcasting an account of the races then being held in Singapore. All this, quite apart from the presumptions contained in the section which I hold are not applicable, lead in my view to the irresistible conclusion that habitual betting (though not necessarily within the restricted meaning I have referred to above) was being carried on in that room. Mr. Lim Cheng Poh in attempting to establish the private as distinct from the public (or "common") nature of the betting which was, he admitted, being carried on, drew my attention to the frequency with which certain names recurred. These are obviously names of punters who laid bets with the accused, and tend to support the conclusion that the betting which was going on was habitual; in the wider sense though not in the narrower sense adopted by the Court of Appeal.

I revert again to the first part of the definition in respect of which I have held that public access had not been proved. If I was wrong in this, nevertheless there is another reason why the prosecution cannot get home under this part of the definition.

Nothing in the defence, which comprised only the evidence of the accused, displaced the presumption, set up by the prosecution, that betting was being carried on in the small front room on the groundfloor of these premises. This room, in my view, could be held to be a place within the meaning of the section but for one important consideration. That consideration is the decision of the Court of Appeal referred to in *Li Kim Poat's case*[3]. Unhappily — if I may presume so to state with the greatest respect — the views of Whitley J. did not prevail and it was held that the small area indicated in the charge which was, in fact, referred to as a bench in the Members' Enclosure did not in the circumstances of the case amount to a "place" within the meaning of the definition contained in the appropriate Ordinance, which definition is in *pari materia* with the definition of "place" contained in the Betting Ordinance, 1953 (see section 2). If the bench in a Club could not be regarded as a place because the purposes to which that small spot were being devoted were at variance with the general purposes to which the whole Club premises were being devoted, could it not be urged that, by the same token, a small room in 216A, Macalister Road devoted as was clearly admitted by the appellant's Counsel to betting, was similarly not a place since the rest of the premises were devoted to the ordinary purposes of domestic residence or a series of domestic residences or business premises? I think it could, and thus if I am wrong and if the charge had been properly laid it may well be that the prosecution would in any event have failed under the first part of the definition quite apart from the second.

Another question arises leading to the same result. Upon the same hypothesis and assuming that the premises in question were not the whole of No. 216A Macalister Road but only the small front room occupied by the appellant, could it not be urged that by the same token a small portion of that room, shall we say a desk and table together with the respective telephones thereon, was not a place within the meaning of the section as construed by the Court of Appeal, since that place, that is to say, the room was largely devoted to the business activities of the appellant? At least that was the appellant's evidence and the prosecution have not sought to controvert it, and I see no reason why it should not have been accepted.

The one consideration which insinuates itself here is that whereas in *Li Kim Poat's case*[3] the betting was clearly limited to the members who used the whole Club premises, in the present case the defence has not attempted to show that the persons engaged in the betting were limited either in the first place to the residents of the whole premises at 216A, Macalister Road or to the business associates of the appellant as the case may be.

This may seem upon first sight to dispose of the case for the appellant under the first part of the definition, but not so. I have already held that the public access required by the definition was lacking.

There are two statutory interpretations of the phrase "common betting house" as I have already indicated. Under the second alternative definition (which I have termed the "closed type") proof of habitual betting is sufficient if, and only if, it can be shown that the spot or place is principally devoted to the purposes of betting. This is the majority opinion, as I understand it, in *Li Kim Poat's case*[3], and the effect of it upon the circumstances of the present case is definitive. Whether this spot or place be taken as the room or the desk with the telephone within that room there is

no evidence that it was principally devoted to the business of betting. On the contrary. The appellant's own evidence, as I have indicated, has shown that other business was carried on there and that this other business was the principal use to which the room or the desk for that matter was put. (See page 32, also page 33 of the record). The prosecution has not attempted to controvert this and the conclusion I draw is that on this alternative version of the definition of common betting house the prosecution was also destined to fail.

If I am wrong in this, there is another reason why I consider I must allow this appeal.

I indicated at the outset that the charge does not state which portion of these premises was alleged to have been used as a common betting-house. There was as will now be seen a further and more fundamental objection to the charge.

The definition of "common betting-house" in the Ordinance clearly presupposes as I have said the existence of two types of common betting-house within the meaning of the Ordinance — the first being what I will call the "open type" where the public have access and the second being what I will call the "closed type", where the public have no access but where habitual betting is carried on. The prosecution have not made it clear to which type they have referred in the charge and I consider that this omission may well have prejudiced the defence. A consideration of the whole case will indicate what I mean. In the Court below the defence was that the appellant did not have possession of the incriminating documents and knew nothing about them; in this Court, whilst it was admitted that betting was being carried on, it was urged the premises were not a common betting-house within the alternative definition set forth in the Ordinance. Although this apparent confusion on the part of the defence might upon one view of the facts tell against the appellant's case, upon another view it might, and I think should, tell in its favour. The confusion might well have been due to the omission of the prosecution to carry out its duty which was to indicate clearly in the charge the offence or offences which the accused was alleged to have committed.

A consideration of *Li Kim Poat's case*[3] will indicate how the prosecution approached its task in that case. Two charges were laid in the alternative indicating for one thing the particular place or spot at which it was alleged that a common betting-house was being carried on; and for another the charges were laid in the alternative under both portions of the definition; in other words, it was alleged in the alternative that it was an open and that it was a closed common betting-house in the senses in which I have used those terms above.

In conclusion, although these points regarding the charge were not contended for by Counsel for the appellant and although I would thus deal with them not upon the petition but under my powers of revision, I should have been obliged to consider that the trial was unsatisfactory. On both scores, therefore, I hold that the conviction must be quashed. I so order and direct that the fine, if paid, should be refunded.

Appeal allowed.

Solicitors: *Pillai, Lim, Lee & Hwang.*

M. LEE v. R.C.H. LIM & CO.

[C. A. (Whyatt C.J., Hill Ag. C.J. (F.M.) and Knight J.) June 28, 1957]

[Singapore — Civil Appeal No. 31 of 1956]

Practice — Judgment for plaintiffs by consent — Costs — Whether plaintiffs entitled to costs of motion for judgment or only costs of obtaining Order in Chambers — R.S.C., O. 31, r. 6.

Under the Rules of the Supreme Court, 1934, Order 31, r. 6 any party may at any stage of a cause or matter apply to the Court or a Judge for judgment upon admission of fact. The application may be made by way of Motion in open Court or by way of Summons to a Judge in Chambers. But when the defendant consents to the order being made in Chambers, the costs of a Summons only will be allowed except in particular circumstances.

Where the plaintiff proceeds by way of Motion, the Judge, in exercising his discretion as to costs, will not ordinarily allow the plaintiff more than the costs of a summons unless there is some good reason, such as the need for publicity, for the hearing to be in Court rather than in Chambers.

Case referred to:—

(1) *Fox v. Luke* 43 R.P.C. 37.

COURT OF APPEAL.

G. J. Okell for the appellant/defendant.

C. F. J. Ess for the respondents/plaintiffs.

Whyatt C.J. (with whom **Hill Ag. C.J. (F.M.)** and **Knight J.** agreed): — The point for decision in this appeal which is brought by leave is whether this Court should vary an order for costs made by Mr. Justice Whitton on a motion for judgment by which the defendant was ordered to pay to the plaintiffs, in addition to such costs as would have been incurred if the application had been made by summons in chambers, half the difference between the costs of proceeding by